ISSUED: December 24, 2002

D.T.E. 01-70

Complaint of Fiber Technologies Networks, L.L.C., pursuant to G.L. c. 166, § 25A and 220 C.M.R. § 45.00 et seq. regarding access to poles owned or controlled by Shrewsbury's Electric Light Plant

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INTERLOCUTORY ORDER ON MOTION OF FIBER TECHNOLOGIES NETWORKS FOR SUMMARY JUDGMENT AND ON APPEALS OF FIBER TECHNOLOGIES NETWORKS FROM HEARING OFFICER RULINGS ON MOTIONS TO COMPEL RESPONSES TO INFORMATION REQUESTS

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I. INTRODUCTION

On August 27, 2001, Fiber Technologies Networks, L.L.C. ("Fibertech") filed a complaint with the Department of Telecommunications and Energy ("Department") pursuant to G.L. c. 166, § 25A ("Pole Attachment Statute") and 220 C.M.R. § 45.00 et seq. ("Pole Attachment Regulations"), seeking access to install dark fiber cables[1] in the town of Shrewsbury, Massachusetts on poles and conduits owned by Shrewsbury's Electric Light Plant ("SELP"). By law, utilities, including municipal light plants such as SELP, must provide "licensees" with nondiscriminatory access to place "attachments" on poles, ducts, conduits, and rights of way owned or controlled by the utility. G.L. c. 166, § 25A; 220 C.M.R. § 45.03. Fibertech claims that SELP has wrongfully denied it access to its poles, ducts, and conduits, and requests a finding that Fibertech is entitled to nondiscriminatory access on the grounds that (1) Fibertech's registration with the Department as a common carrier is conclusive evidence that it is a licensee, and (2) Fibertech's dark fiber qualifies as an attachment.

The Department docketed the matter as D.T.E. 01-70. Pursuant to notice duly issued, the Department conducted a public hearing on October 18, 2001. The Department granted limited participant status to Metromedia Fiber Network Services, Inc.

II. PROCEDURAL HISTORY

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[1] In order for data to be transmitted across fiber optic cable, equipment must be connected at both ends of the fiber strand to transmit and receive light pulses. Dark fiber is fiber optic cable that is provisioned without equipment included at both ends of the strand and thus is "dark." Even when the party to whom the fiber is provisioned lights the cable by connecting its own electronics to the fiber, the cable is still referred to as "dark fiber," because the dark fiber provider is responsible for maintaining only the fiber, not the electronics.

During the course of discovery in this proceeding, the parties were unable to resolve a number of discovery disputes. SELP filed three separate motions[2] to compel responses to information requests pertaining to information about Fibertech's networks, business plans, and customer contracts ("SELP Motions to Compel"). Fibertech opposed[3] all three motions to compel ("Fibertech Discovery Opposition"). On November 28, 2001, Fibertech filed a motion to compel responses to information requests pertaining to legal opinions and research of SELP's counsel ("Fibertech Motion to Compel"). On January 25, 2002, SELP filed an opposition to this motion ("SELP Discovery Opposition"). On February 14, 2002, the hearing officer denied Fibertech's Motion to Compel and granted SELP's Motions to Compel ("Fibertech Discovery Ruling" and "SELP Discovery Ruling").

On February 19, 2002, Fibertech appealed both rulings ("First Fibertech Appeal" and "Second Fibertech Appeal"). On February 21, 2002, SELP filed responses to both appeals ("SELP Response to First Appeal" and "SELP Response to Second Appeal").[4]

On March 1, 2002, Fibertech filed a Motion for Summary Judgment. On March 22, 2002, SELP filed an Opposition to the Motion for Summary Judgment. Fibertech

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2 SELP filed motions to compel on November 20, 2001; November 28, 2001; and January 24, 2002.

3 Fibertech filed its oppositions on November 28, 2001; November 29, 2001; and January 25, 2002.

4 Fibertech also filed "reply" briefs to SELP's responses on February 27, 2002. These additional replies were not provided for in the Department's procedural rules, and Fibertech did not seek leave to file them. As such, they are not considered here.

and SELP filed surreplies, on April 4, 2002 and April 11, 2002, respectively, as permitted by the hearing officer.

At issue in this case is whether Fibertech qualifies as a "licensee" and whether the dark fiber cables that Fibertech seeks to attach to SELP's poles and conduits qualify as "attachments." Because our rulings on Fibertech's motion for summary judgment affect the scope of this proceeding, and therefore affect our rulings on the motions to compel, we address Fibertech's motion for summary judgment first.

III. FIBERTECH MOTION FOR SUMMARY JUDGMENT

A. Introduction

The Department's Pole Attachment Regulations state that a utility must provide a "licensee" with nondiscriminatory access to place "attachments" on its poles, ducts, conduits, or rights-of-way, but that the utility may deny a licensee access for "valid reasons of insufficient capacity, reasons of safety, reliability, generally applicable engineering standards, or for good cause shown." 220 C.M.R. §§ 45.02, 45.03; see also G.L. c. 166, § 25A. Neither party has alleged that SELP's denial of Fibertech's request for attachment was based on reasons of insufficient capacity, safety, reliability, or engineering standards. Therefore, after setting forth the standard of review and describing the generally undisputed facts below, we review whether Fibertech has demonstrated first that it qualifies as a "licensee," and second whether the facilities that Fibertech seeks to install on SELP's poles and conduits qualify as "attachments."

B. Standard of Review

The Department's procedural rules authorize the use of full or partial summary judgment in Department decisions. 220 C.M.R. § 1.06(e). The rule specifically provides that "[a] party may move at any time after the submission of an initial filing for dismissal or summary judgment as to all issues or any issue in the case." Id. Summary judgment may be granted by an administrative agency where the pleadings and filings conclusively show that the absence of a hearing could not affect the decision. Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 783-86 (1980); see also Hess & Clark, Div. of Rhodia, Inc. v. Food and Drug Administration, 495 F.2d 975, 985 (D.C. Cir. 1974). The standard of review on motions for summary judgment in judicial proceedings is instructive and satisfies the requirements of procedural due process in administrative proceedings. 9 Mass. App. Ct. at 789; see also Mass R. Civ. P. 56.

In determining whether to grant a motion for summary judgment, the Department will review the initial pleadings, pre-filed testimony, responses to discovery, and the memoranda of the parties. IMR Telecom, D.P.U. 89-212, at 12 (1990). Summary judgment is appropriate if a review of the materials on file shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Cambridge Electric Light Company/MIT, D.P.U. 94-101/95-36 (1995), citing Re Altresco Lynn Inc./Commonwealth Electric Company, D.P.U. 91-142/91-153, at 10 (1991). An opposing party may not rest on mere allegations or pleadings, but must support that opposition by affidavit and supporting papers. See Mass. R. Civ. P. 56(e). If an opposing party demonstrates "an authentic need for,

and an entitlement to, an additional interval in which to marshal facts essential to mount an opposition," the Department may deny the motion for summary judgment or order a continuance to permit the opposing party to obtain further discovery. See Resolution Trust Corp. v. North Bridge Assoc., 22 F.3d 1198, 1203 (1st Cir. 1994); Mass R. Civ. P. 56(f).

C. Summary of Facts

For the purpose of determining Fibertech's Motion for Summary Judgment, the Department reviews the following undisputed facts submitted by the parties in all pleadings, pre-filed testimony, discovery responses,[5] and memoranda. D.P.U. 89-212, at 12; Mass. R. Civ. P. 56(e). Where the facts are disputed, we specifically indicate each party's position. We determine whether those disputed facts are genuinely in dispute or material to the issues before us in our analysis below.

Fibertech is a New York limited liability company (Complaint at ¶ 4; SELP-1-1). Fibertech claims that the nature of its business is "designing, building, and leasing dark fiber networks" (Testimony of Frank Chiano at 2) ("Chiano Testimony"). Fibertech further claims that it has networks in construction in Springfield and Worcester, Massachusetts, as well as a number of networks completed or in construction in a number of cities outside Massachusetts (Chiano Testimony at 3-4). Fibertech does not supply its customers with the electronic equipment necessary to light the fiber; rather, its customers supply the electronics according to their own needs (Chiano Testimony at 3; Motion for Summary Judgment at 1). Fibertech

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[5] All citations to information requests below are to responses filed by the responding party.

claims to have signed dark fiber contracts with competitive local exchange carriers ("CLECs"), interexchange carriers ("IXCs"), businesses, educational institutions, and governmental entities, including Choice One Communications, AT&T, Quest, Allegiance, CTC Communications, Global Crossing, Connecticut Telephone, the State of Connecticut, and an unnamed school district in the Worcester area (Chiano Testimony at 4). Fibertech, however, objects to producing copies of these contracts, which are the subject of SELP's Motions to Compel. SELP contends that the nature of Fibertech's business is not established because these supporting documents have not been produced.

Fibertech has executed aerial and conduit license[6] agreements with New England Telephone and Telegraph Company ("Verizon"), Western Massachusetts Electric Company ("WMECo"), and Massachusetts Electric Company ("MECo") and with the municipal light plants of Templeton and Holden, Massachusetts, jointly with Verizon (Chiano Testimony at 7; SELP-1-3). These aerial and conduit agreements set forth rates, terms and conditions for obtaining attachments to poles and conduits owned or controlled by Verizon, WMECo, or MECo, or by the towns of Templeton or Holden, jointly with Verizon (SELP-1-3).

SELP owns the poles on which Fibertech seeks to attach its dark fiber (Answer at ¶ 7). SELP also operates Shrewsbury's Community Cablevision ("SCC"), the sole cable operator in Shrewsbury (see Answer at ¶ 5; Complaint at ¶ 5).

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6 Neither party claims that the term "license" in these agreements is used in the same manner as the type of license that would qualify Fibertech as a "licensee" under G.L. c. 166, § 25A, nor does the Department consider them equivalent.

On October 2, 2000, Fibertech sent SELP a request to enter into a "Pole Attachment Agreement and License" to attach to utility poles in Shrewsbury (Complaint at ¶ 12, citing Aff. of Jennifer Starks, exh. B; Answer at ¶ 12). In response, SELP offered Fibertech "proposed terms and conditions" for attachments along the route that Fibertech had proposed, but indicated that a portion of this route would require new conduit placement, and that Fibertech would be responsible for these costs (Complaint at ¶ 14, citing Aff. of Jennifer Starks, exh. D; Answer at ¶ 14). The terms that SELP offered,[7] however, also required Fibertech to "pass all ownership interest in the cable to SCC at no cost to SCC," and lease the cable back (Aff. of Jennifer Starks, exh. D). Further, SCC would not be required to permit any interconnection points within Shrewsbury to allow Fibertech to serve any customers in Shrewsbury, "except as SELP may allow for its own benefit" (id.). The terms also would have given SELP the right to lease, at a 50 percent discount from Fibertech's standard rates, up to twelve fibers from Shrewsbury to a point anywhere on Fibertech's system (id.).

On May 15, 2001, SELP submitted a memorandum to Shrewsbury's Town Manager and to the Chairman of the Board of Selectmen, opining that Fibertech "does not meet the [Department's] criteria to mandate pole attachments from SELP" and advising them that "[n]o action is required at this time other than making you aware of the situation" (Fibertech-1-1). On June 7, 2001, Fibertech sent SELP a "formal request for pole attachment and conduit

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[7] Verizon and MCI Metro Access Transmission Services, Inc. ("MCI") have pole attachment agreements with SELP, but these agreements do not require the companies to pass ownership of the attached facilities to SELP, do not prohibit the companies from serving customers in Shrewsbury, and do not require the companies to provide a discount on services to SELP (see Fibertech-2-3).

agreements from SELP" (Complaint at ¶ 18, citing Aff. of Mario Rodriguez, exh. C; Answer at ¶ 18) SELP responded on July 19, 2001 that:

> [Fibertech] has not demonstrated that it is transmitting intelligence by telephone, television or electricity as required by G.L. c. 166, §§ 21, 22 and 25A. As we understand, Fibertech is not a competitive local exchange carrier. Fibertech also is not a CATV operator or an electric company. Rather, Fibertech appears to be in the business of constructing dark fiber and leasing that fiber to other companies. Accordingly, it is our opinion that Fibertech is not entitled to a grant of location pursuant to G.L. c. 166, §§ 21, 22 and as such, it does not qualify as a licensee pursuant to G.L. c. 166, § 25A. Thus, at this time, Fibertech has not met the standards for attachments to SELP's poles.

(Complaint at ¶ 19, citing Aff. of Mario Rodriguez, exh. D; Answer at ¶ 19).

On August 9, 2001, Fibertech filed with the Department a Statement of Business Operations[8] and proposed tariffs, Fibertech M.D.T.E. 1 and M.D.T.E. 2. The Department permitted the tariffs to go into effect. According to Fibertech's Statement of Business Operations,

> [i]nitially, [Fibertech] will develop and lease high capacity dark fiber for use by Government/Education, business, and various communication carriers . . . . As market conditions and economics dictate, [Fibertech] intends to supplement these offerings with additional services including local exchange voice and data throughout the service territory of Verizon and long distance services throughout the Commonwealth of Massachusetts.

(Statement of Business Operations at 3). Fibertech further stated that it intends to provide facilities-based services and that it "is currently in the process of selecting the locations of its facilities" (id. at 2). Fibertech's tariffs provide for retail local exchange and interexchange services (M.D.T.E. 1, § 5; M.D.T.E. 2, § 3).

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[8] The Statement of Business Operations is a form that the Department requires new common carrier registrants to file. We discuss this form in more detail below.

On September 28, 2001, Fibertech filed with Shrewsbury's Board of Selectmen a "Petition to Install and Maintain Fiber Optic Facilities" across public ways in Shrewsbury (Fibertech-1-1). The Board of Selectmen has not acted upon the petition, and Fibertech states that it has not received local grants of location (Motion for Summary Judgment at 1-2).

D. Whether Fibertech is a Licensee

1. Fibertech

Fibertech argues that the threshold question raised by its Motion for Summary Judgment is "whether the 'existence of [Fibertech's Statement of Business Operations] and tariffs' is conclusive evidence of Fibertech's status as a licensee within the meaning of Section 25A" (Fibertech Surreply at 2). Fibertech argues that because it has filed a Statement of Business Operations with the Department and has an approved tariff, it is a "licensee" (Motion for Summary Judgment at 7; Fibertech Surreply at 2). Fibertech states that the Pole Attachment Statute and Regulations define the term "licensee" as "any person, firm or corporation other than a utility, which is authorized to construct lines or cables upon, along, under and across the public ways" (Motion for Summary Judgment at 7). Therefore, Fibertech argues that by filing a Statement of Business Operations and having an approved tariff, it is a registered common carrier, and thus, "authorized" by the Department as a licensee (id. at 8, citing Regulatory Treatment of Telecommunications Common Carriers Within the Commonwealth of Massachusetts, D.P.U. 93-98, at 7 (1994) ("Entry Regulation")). Fibertech asserts that no authority other than the authority to provide common carrier services is required in order to be a licensee for purposes of G.L. c. 166, § 25A (Motion for Summary Judgment at 8).

Fibertech argues that state law does not confer any authority upon the Board of Selectmen or SELP to determine who is a "licensee" within the meaning of the Pole Attachment Statute (id.). Fibertech contends that because the Legislature has given the Department the power of "[g]eneral supervision and regulation, and jurisdiction and control over common carriers furnishing supplies or rendering services to the public within the Commonwealth," the Department's authority supersedes the authority of local boards, "'insuring the uniformity in all matters connected with common carriers including . . . the transmission of intelligence . . . by means of telephone or telegraph lines, or any other system of communications'" (id., quoting New England Tel. & Tel. Co. v. City of Brockton, 332 Mass. 662, 667-68 (1955)).

Therefore, Fibertech argues that it is not required to obtain a grant of location from the Board of Selectmen in order to be considered a "licensee" (id. at 9). Fibertech contends that to require it first to obtain a grant of location would amount to an additional layer of review that would inhibit competitive entry, contrary to the Department's intent in eliminating certification hearings in Entry Regulation, D.P.U. 93-98. Further, Fibertech argues that such a requirement would "facilitate the kinds of local barriers to telecommunications entry that

[G.L. c. 166, § 25A] and Sections 224[9] and 253[10] of the Telecommunications Act [of 1996] are intended to prevent" (id.).

Fibertech contends that even if it ultimately must seek a grant of location, this requirement does not affect its status as a licensee. General Laws Chapter 166, § 21 provides that "[a] company incorporated for transmission of intelligence by electricity or by telephone, whether by electricity or otherwise, . . . may, under this chapter, construct lines for such transmission up, along, under and across public ways . . ." (Motion for Summary Judgment at 10). Fibertech notes that this language closely parallels G.L. c. 159, § 12, which grants the Department jurisdiction over companies that provide "[t]he transmission of intelligence within the commonwealth by electricity, by means of telephone or telegraph lines or any other method or system of communications . . ." (id. at 10). Therefore, Fibertech argues, "[G.L. c. 166, § 21] establishes general authority for carriers regulated by the [Department] to occupy the public ways, subject to specific grants of location under [G.L. c. 166, § 22] and the general

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9 Section 224 of the Telecommunications Act of 1996 is the Federal Pole Attachment Statute. This section provides that a "utility shall provide a . . . telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it" but that the FCC would not have jurisdiction if the state certifies to the FCC that it regulates rates, terms, and conditions for pole attachments and has effective regulations to implement that authority. 47 U.S.C. § 224(c), (f).

10 Section 253 of the Telecommunications Act of 1996 provides that no state or local statute or regulation may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services, except on a "competitively neutral basis." 47 U.S.C. § 253.

constraint that such use not 'incommode public use' or 'endanger navigation'" (id. at 10).[11] Fibertech argues that nothing in these statutes makes this "general authority" contingent on obtaining grants of location and that the purpose of the statutes was to "supersede the authority of local boards with [Department] authority" (id.).

Fibertech rejects SELP's argument that Fibertech is not a common carrier because it does not provide retail service to end-users, but rather, is a "carrier's carrier" (Motion for Summary Judgment at 11). Fibertech contends that the Telecommunications Act of 1996 "specifically contemplates wholesale carriers" (id. at 12, citing 47 U.S.C. § 251(c)).[12] Further, Fibertech argues that when the Department revised its Pole Attachment Regulations, it did so "to conform Massachusetts regulation in this area to federal law and 'to effect legislative intent' in the Telecommunications Act of 1996" (Motion for Summary Judgment at 13, citing Nondiscriminatory Access to Utility Poles, Ducts, Conduits, and Rights-of-Way, D.T.E. 98-36-A at 2 (2000) (Order Promulgating Final Regulations)). Therefore, Fibertech argues that the Department should interpret the term "licensee," under G.L. c. 166, § 25A, to be "at least co-

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[11] Fibertech does not dispute that cities and towns have the authority to regulate grants of location based on "issues of safety and aesthetics" (Fibertech Surreply at 7).

[12] Fibertech cites to § 257(c) in the motion, but because the citation does not at all support its proposition that ILECs are required "to act as wholesale carriers for CLECs," we assume that the citation is a typographical error and that Fibertech intended to refer to 47 U.S.C. § 251(c), which addresses the provision of unbundled network elements.

extensive with 'a provider of telecommunications service' and 'telecommunications carrier' under [47 U.S.C. § 224]"[13] (Motion for Summary Judgment at 13).

Fibertech argues that Department precedent establishes that the provision of dark fiber is a "telecommunications service" (Motion for Summary Judgment at 13, citing Petition of Global NAPs, Inc. against New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts Regarding Dark Fiber, D.T.E. 98-116 (2000), aff'd sub nom. Global NAPs, Inc. v. New England Tel. & Tel. Co., 156 F. Supp. 2d 72 (D. Mass. 2001)). Further, Fibertech cites to a policy letter issued by the Department's Telecommunications Division, stating that "the Department considers the wholesale provision of dark fiber to be a common carrier telecommunications service subject to our authority" (Motion for Summary Judgment at 14, citing Letter to Alan D. Mandl from Michael A. Isenberg, Director, Telecommunications Division (Oct. 20, 1999)). Therefore, Fibertech concludes that "dark fiber in Massachusetts indisputably is categorized as a telecommunications service" and "[a]s a corollary, a dark fiber carrier is a 'licensee' under [G.L. c. 166, § 25A]" (id.).

2. SELP

SELP argues that Fibertech's Statement of Business Operations and filed tariff are not sufficient to establish that Fibertech is a "licensee" as a matter of law (SELP Opposition at 8-9; SELP Surreply at 2). Rather, SELP argues, these filings only show that Fibertech intends to

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[13] The Federal Pole Attachment Statute does not refer to "licensees," but rather, to "telecommunication carriers." Fibertech states that, under the Telecommunications Act, "telecommunications service" includes not only service "directly to the public" but also "to such classes of users as to be effectively available to the public" (Motion for Summary Judgment at 12).

operate in Massachusetts as a CLEC, without providing information about Fibertech's actual "plans" to operate in the future as a CLEC (SELP Opposition at 9).[14] SELP notes that Fibertech concedes that "[G.L. c. 166, § 25A] does not by its terms refer to common carriers . . ." (SELP Opposition at 9, citing Motion for Summary Judgment at 8 n.5). SELP argues that "[i]f the Legislature had intended for the act of registering as a common carrier under [G.L. c. 159, § 12] to suffice for purposes of obtaining 'licensee' status under G.L. c. 166, § 25A, then it could have provided for such under the definition of 'licensee'" (SELP Opposition at 9). SELP further argues that if the Department had intended registration as a common carrier to be sufficient, it would have defined "licensee" in this manner in its Pole Attachment Regulations (id. at 16).

In addition, SELP argues that a construction of G.L. c. 166, § 25A interpreting that "licensees" are authorized under G.L. c. 159, § 12 to construct in public ways would impermissibly render G.L. c. 166, § 22 a complete nullity when a sensible construction is readily available (SELP Opposition at 11, citing Manning v. Boston Redev. Auth., 400 Mass. 444, 453 (1987); see also SELP Opposition at 9, citing LaBranche v. A.J. Landers & Co. [sic], 404 Mass. 725, 728 (1989)). SELP argues that regulation of wires across the public ways in Massachusetts is reserved to the cities and towns, and appeals from local

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[14] SELP further contends that Fibertech has filed a "sham [Statement of Business Operations] and tariffs" that are unrelated to the "provision of dark fiber" (SELP Opposition at 9). SELP argues that Fibertech filed these documents "solely for the purpose of attempting to bootstrap itself to 'licensee' status under G.L. c. 166, § 25A" (id.).

decisions under G.L. c. 166, § 22 do not lie with the Department (SELP Opposition at 11, citing Boston Edison Co. v. Board of Selectmen of Concord, 355 Mass. 79, 84 (1968)).[15]

SELP argues that because Fibertech's Statement of Business Operations and tariffs do not establish that Fibertech is a licensee, Fibertech has not established that it is in the business of providing dark fiber (SELP Opposition at 10). SELP contends that the record in this case only includes "unsubstantiated and vague statements regarding the very general nature of Fibertech's business, products, services and customers," and that while Fibertech states that documents that describe its business, such as agreements and leases, do exist, Fibertech has refused to produce such documents (id.). SELP asserts that these documents will show what exactly Fibertech means when it claims that it "provides" dark fiber and will show the nature of Fibertech's "leases" (id. at 11). SELP therefore argues that summary judgment is inappropriate because Fibertech has not produced discoverable materials that are material to the pending motion (id. at 14, citing Mass. R. Civ. P. 56(f)).

3. Analysis and Findings

The Pole Attachment Statute defines the term "licensee" as "any person, firm or corporation other than a utility, which is authorized to construct lines or cables upon, along, under and across the public ways." G.L. c. 166, § 25A. The definition of "licensee" under

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[15] SELP also contends that the Board of Selectmen could deny Fibertech a grant of location if the attachment would "incommode the public use" or would be aesthetically displeasing (SELP Opposition at 11-12). SELP further contends that the Telecommunications Act's proscriptions against local barriers to entry are not relevant in such a case, and further that nothing in the Telecommunication Act classifies the "provision of dark fiber" as a "telecommunications service" (id. at 12).

the Pole Attachment Regulations is essentially identical. 220 C.M.R. § 45.02. The question is whether Fibertech is so authorized. The Legislature did not define the term "authorized" within G.L. c. 166, § 25A. Nor did the Department define who is "authorized" within 220 C.M.R. § 45.02.

Fibertech claims that it qualifies as a licensee solely by virtue of being a registered common carrier, and that its Department-granted authority to operate as a common carrier under G.L. c. 159, § 12 is the only "authority" that it needs. Alternatively, Fibertech argues that because the language of G.L. c. 166, § 21, which describes the classes of persons who may construct lines across public ways, i.e., "[a] company incorporated for the transmission of intelligence by electricity or by telephone, whether by electricity or otherwise,"[16] is parallel to the language of G.L. c. 159, § 12, which describes classes of persons subject to tariff regulation as telecommunications common carriers by the Department, i.e., companies that render "for public use within the commonwealth" services including "[t]he transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communications," the fact that it has registered as a common carrier demonstrates conclusively that it falls within the class of persons described by G.L. c. 166, § 21, and that therefore it is authorized to construct lines across the public ways for the purposes of G.L. c. 166, § 25A. Neither assertion of authority is correct.

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16 We read the term,"incorporated for the transmission of intelligence," in the more general sense of being "in the business of" or "having as a business purpose," rather than being limited to a specific form of enterprise organization.

To explain this conclusion, it is helpful first to review the regulatory history behind requiring common carriers to file a Statement of Business Operations and a tariff. Prior to 1994, in terms of new market entry, the Department required carriers to apply for a certificate of public convenience and necessity.[17] In determining whether to grant the certificate, the Department examined and made findings of fact about "the managerial, technical, and financial ability of the applicant as well as the public need for the proposed service." See, e.g., MCI Telecommunications Corp., D.P.U. 1655, at 2 (1984). In reviewing the "public need," the Department examined not only the specific, unmet public demand for proposed services, but also the benefits to market competition. Id. at 3. When the Department issued the certificate, the Department granted general authority to offer intrastate service. Id. at 8. This certificate could be issued independently of approving a tariff. Id.

The growth of competition in telecommunications led the Department to reconsider the requirement for common carriers of telecommunications services to obtain certificates of public convenience. When the Department eliminated this requirement, we found that market forces, statutory requirements, and the Department's tariff review process were sufficient to ensure that rates are just and reasonable and to provide adequate consumer protection, without the need to regulate entry into these markets. Entry Regulation, D.P.U. 93-98, at 12. Today, the Department only requires companies to submit to a registration process by filing a Statement of

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[17] The certificate of public convenience and necessity was not required by statute, but rather, was a regulatory creation arising out of the Department's general oversight authority. See G.L. c. 159, § 12; IntraLATA Competition, D.P.U. 1731 (1985). Many other states still issue certificates of public convenience for telecommunications carriers.

Business Operations[18] and an initial tariff. In the registration process, the Department reviews whether the filed tariffs are just and reasonable. Registration does not involve a finding that the company is engaged currently in the transmission of intelligence, nor does the Department have a requirement that a company be engaged currently in the transmission of intelligence in order for it to maintain its registration. The only determination made is that the applicant is authorized, by virtue of having an approved tariff, to provide the tariffed services. We note that many companies register in advance of doing business within Massachusetts, and some never do become operational.

The effective tariff is prima facie evidence only that the rates are lawful, until changed or modified by the Department. G.L. c. 159, § 17. However, the lawfulness of approved tariffs "shall not give to such rates any greater weight as evidence of the reasonableness of other rates than they would otherwise have." Id. A company's registration, viz. the company's approved tariffs, is not evidence that the Department has granted any authority beyond the authority to offer the tariffed services. Registration itself does not show that the Department has authorized a company to construct lines across public ways or show that the

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[18] The Statement of Business Operations is a form that includes descriptions of the services to be provided, geographical service areas, and any facilities to be constructed. Carriers also provide a supplementary statement of their business operations in their annual return filings. See G.L. c. 159, § 32; G.L. c. 166, § 11.

company is in the business of transmission of intelligence.[19] Therefore, Fibertech's registration as a common carrier does not establish that the Department has authorized Fibertech, pursuant to G.L. c. 159, § 12, to construct lines across the public ways. Similarly, Fibertech's registration as a common carrier does not itself establish that it is actually in the business of transmission of intelligence; in permitting registration, the Department has made no such affirmative finding.

We note also that approval of a tariff does not constitute a finding that the company engages in common carriage by providing the tariffed services. In approving the tariff, the Department presumes that the company proposes to engage in common carriage. The Department can and has rebutted that presumption where the evidence shows that the company was not engaged in regulated common carrier services (Memorandum from Michael Isenberg, Director, Telecommunications Division, to all Massachusetts Telecommunications Service Providers (Oct. 12, 2001) (withdrawal of tariffs for retail xDSL services in Massachusetts)).

Fibertech argues that the Department should interpret the term "licensee" to be co-extensive with "a provider of telecommunications service" under the Federal Pole Attachment Statute. Such an interpretation would require the Department improperly to ignore

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[19] In fact, carriers generally are not required to seek Department approval to construct facilities. There are a few limited exceptions. One example is the requirement for a utility to seek grants of location from the Metropolitan District Commission ("MDC") for any boulevard or reservation under the control of MDC that the MDC finds, in consultation with the Department, to be required for public convenience and necessity. G.L. c. 92, § 43; see, e.g. New England Telephone and Telegraph Company, D.P.U. 87-150 (1987); New England Telephone and Telegraph Company, D.P.U. 87-79 (1987). No party has alleged, and it is not the case, that the locations that Fibertech seeks are under the control of the MDC.

G.L. c. 166, §§ 21 and 22, which provide a clear statutory framework for determining when a company may be authorized to construct lines across the public ways. See LaBranche v. A.J. Lane & Co., 404 Mass. 725, 728-29 (1989).[20] We decline to interpret the term "licensee" so expansively.

General Laws Chapter 166, § 21 addresses who may construct lines across the public ways and under what conditions. Section 21 provides that "[a] company incorporated for the transmission of intelligence by electricity or by telephone, whether by electricity or otherwise. . . may, under [Chapter 166], construct lines for such transmission upon, along, under and across the public ways . . . ." We note that the companies described by G.L. c. 166, § 21 are not limited to companies that provide services "rendered for public use," as in G.L. c. 159, § 12. Companies that may apply for grants of location must be engaged in

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[20] In LaBranche, the court held:

> "[W]here two or more statutes relate to the same subject matter, they should be construed together so as to constitute an harmonious whole consistent with the legislative purpose." Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds, 382 Mass. 580, 585, 416 N.E.2d 1373 (1981). "[W]e assume, as we must, that the Legislature was aware of the existing statutes" when it enacted the subsequent statute. Hadley v. Amherst, 372 Mass. 46, 51, 360 N.E.2d 623 (1977). "We will find an implied repeal of one statute by another only when 'the prior statute is so repugnant to, and inconsistent with, the later enactment that both cannot stand.' " Boston v. Board of Educ., 392 Mass. 788, 792, 467 N.E.2d 1318 (1984), quoting Commonwealth v. Graham, 388 Mass. 115, 125, 445 N.E.2d 1043 (1983). Implied repeal of a statute is not favored. See Dedham Water Co. v. Dedham, 395 Mass. 510, 518, 480 N.E.2d 1016 (1985); Cohen v. Price, 273 Mass. 303, 308, 173 N.E. 690 (1930).

404 Mass. at 728-29.

the business of transmission of intelligence, but need not be common carriers. Therefore, whether Fibertech may qualify as a licensee depends not on whether Fibertech is indeed a common carrier, but rather, on whether Fibertech is in the business of transmission of intelligence.

But even if Fibertech were to demonstrate that it is in fact in the business of transmission of intelligence, that would not end the inquiry. Section 21 places a limitation on a company's authority to construct lines across the public ways. Section 21 provides that such a company may construct lines, "but such company shall not incommode the public use of public ways or endanger or interrupt navigation." G.L. c. 166, § 21. Section 22 specifies a procedure for obtaining authority to construct lines across a public way, specifically that

> [a] company desiring to construct a line for such transmission upon, along, under or across a public way shall in writing petition the board of aldermen of the city or the selectmen of the town where it is proposed to construct such line for permission to erect or construct upon, along, under or across said way the wires, poles, piers, abutments or conduits necessary therefor.

Id. The board of selectmen is then required to hold a public hearing. Id. After a public hearing, the board of selectmen

> may by order grant to the petitioner a location for such line, specifying therein where the poles, piers, abutments or conduits may be placed, and in respect to overhead lines may also specify the kind of poles, piers or abutments which may be used, the number of wires or cables which may be attached thereto, and the height to which the wires or cables may run.

Id.

We find nothing in the statutes or cases cited by Fibertech to support the proposition that Section 21 "establishes general authority for carriers regulated by the [the Department] to

occupy the public ways, subject to specific grants of location under Section 22 and the general constraint that such use not 'incommode public use' or 'endanger navigation'" (Motion for Summary Judgment at 10, citing Boston Edison Co. v. Board of Selectmen of Concord, 355 Mass 79, 87 (1968); New England Tel. & Tel. Co. v. City of Brockton, 332 Mass. 662, 668 (1955)). This interpretation leads to nonsensical legal results. If a "licensee" should be generally authorized to construct lines across public ways, even without receiving specific grants of location, the utility conceivably could be obligated to grant the licensee nondiscriminatory access to its poles under G.L. c. 166, § 25A, while the licensee still would not be authorized to construct specific lines in public ways under G.L. c. 166, § 22, to be attached to those poles.

Rather, we hold that a company that is in the business of transmission of intelligence is "authorized to construct lines or cables upon, along, under and across the public ways" for the purposes of G.L. c. 166, § 25A, after the board of selectmen in the town where the attachments in question are to be located has granted a location for the line.[21] See Cablevision

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[21] We note that other classes of persons may be authorized to construct lines across public ways. A board of selectmen may authorize "citizens of the commonwealth" to establish and maintain poles and wires for "telephonic communication" in conformity with Chapter 166 and other laws pertaining to telephone companies. G.L. c. 166, § 23. Therefore individuals may fall within the class of persons that are licensees under G.L. c. 166, § 25A if they are in the business of transmission of intelligence and have been granted a location to construct lines across public ways. In contrast, a person who constructs a line for his or her own "private use" may also be authorized to construct lines across public ways, but the terms and conditions for attachments for such lines do not fall within the Pole Attachment Statute and are determined by the board of selectmen. G.L. c. 166, § 24. The parties, however, have not alleged facts that implicate §§ 23 or 24.

of Boston v. Public Improvement Comm'n, 184 F.3d 88, 91 (1st Cir. 1999) (noting that § 21 permits Cablevision to install conduit, but that Cablevision must "first obtain a grant of location from the appropriate municipal authority" pursuant to § 22). We note that the court in Concord held that the standard that a municipal board would apply is whether the location sought would "incommode" the public ways in the broadest sense. 355 Mass. 79, 87-91.

The Board of Selectmen has not yet made such a determination, and no facts have been alleged that would permit the Department to review the Board of Selectmen's inaction, or, if inaction may be so construed, constructive denial of a location under G.L. c. 166, §§ 21, 22. The Department has limited authority to grant a location to construct lines, if a board of selectmen has denied a petition for the location or failed to act, but this power is restricted to petitions regarding lines "for the transmission of electricity," and specifically precludes relief to a "telegraph and telephone company." G.L. c. 166, § 28.

Fibertech's insistence that G.L. c. 166, §§ 21 and 22 were enacted to "supersede the authority of local boards with [Department] authority and uniformity" is misplaced (see Motion for Summary Judgment at 10, citing Brockton, 332 Mass. at 668). In Brockton, the city demanded a discount from regular telephone service rates as a condition of granting a location to a telephone company. 332 Mass. at 663. The court held that the city had no authority to fix the telephone rates in granting the locations, and that "[t]he rate-making power over carriers is an inherent attribute of the sovereignty of the state." 332 Mass. at 666, 668. Brockton does not support the proposition that the Department's authority supersedes that of the Board of Selectmen, who may grant or deny Fibertech's petition for a grant of location based on a

determination of whether the route sought incommodes the public ways. In the instant case, the parties have not alleged that the Board of Selectmen has attempted to impose additional terms and conditions on the requested grant of location.

Because the Board of Selectmen has not granted Fibertech's petition for a grant of location, the Department cannot hold that Fibertech is authorized to construct lines across public ways for purposes of G.L. c. 166, § 25A. Further, because we hold that Fibertech's registration as a common carrier is not conclusive evidence of its status as a licensee and does not demonstrate that it is in the business of transmission of intelligence, and because the parties have not submitted sufficient evidence on the nature of Fibertech's business,[22] we hold that there is a genuine issue of material fact that must be tried and that Fibertech is not entitled to judgment as a matter of law. Cambridge Electric Light Company/MIT, D.P.U. 94-101/95-36 (1995), citing Re Altresco Lynn Inc./Commonwealth Electric Company, D.P.U. 91-142/91-153, at 10 (1991). Therefore, we deny Fibertech's motion for summary judgment, in part, on the issue of whether Fibertech is a licensee.

We have concluded that the Department cannot rule on the ultimate question of whether Fibertech is entitled to access to attachments in Shrewsbury until the Board of Selectmen acts on Fibertech's petition for a grant of location. The Department will, however, proceed with its review of Fibertech's complaint on the sole issue of whether Fibertech is incorporated for the

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[22] The evidence submitted consists only of Fibertech's uncorroborated testimony on the nature of its business (see Chiano Testimony at 2-5). To date, Fibertech has not submitted supporting documentation of its dark fiber agreements and plans to offer local exchange and interexchange services.

transmission of intelligence, because SELP advised the Board of Selectmen that Fibertech "does not meet the [Department's] criteria to mandate pole attachments from SELP" and that, therefore, Fibertech is not entitled to a grant of location (Motion for Summary Judgment, att. 13, at 1).[23]

E. Whether Dark Fiber is an Attachment

1. Fibertech

Fibertech argues that dark fiber meets the explicit definition of "attachment," set forth in G.L. c. 166, § 25A (Motion for Summary Judgment at 15). Fibertech states that the section defines an attachment as "any wire or cable for transmission of intelligence . . . installed upon any pole . . . or telephone duct or conduit owned or controlled, in whole or in part, by one or more utilities" (id., citing G.L. c. 166, § 25A). Fibertech argues that the Department has already established that dark fiber is a "telecommunications service" within the meaning of the Telecommunications Act (Fibertech Motion at 13, citing Global NAPs, D.T.E. 98-116, at 9 (2000), aff'd sub nom. Global NAPs, Inc. v. New England Tel. & Tel. Co., 156 F. Supp. 2d 72 (D. Mass. 2001)). Therefore, Fibertech argues that "[d]ark fiber is a 'wire or cable for transmission of intelligence' regardless of whether Fibertech supplies the electronics that transmit light impulses" (Motion for Summary Judgment at 15). Fibertech suggests that, in reviewing whether its dark fiber is an attachment, "[t]he Department has

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[23] Although we are reviewing this issue, we stress that we are not establishing a general requirement that pole attachment applicants must first seek a finding from the Department that they are in the business of transmission of intelligence before they may be considered to be qualified to apply for municipal grants of location.

discretion to interpret and apply the term 'attachment' where appropriate, in order to include a range of both existing and new technologies – consistent with the goals for meaningful competition and to ensure technologically neutral access" (id., citing D.T.E. 98-36-A at 40).

2. SELP

SELP argues that the outstanding discovery questions that are the subject of SELP's Motions to Compel[24] are material to the outcome of this case and will inform the Department's decision as to whether dark fiber can be considered an "attachment" under G.L. c. 166, § 25A (SELP Opposition at 10). SELP argues that when the Department promulgated regulations on nondiscriminatory access, it specifically declined to determine which technologies qualify as "attachments" under G.L. c. 166, § 25A (id. at 16-17, citing D.T.E. 98-36-A at 40). Therefore, SELP argues, the Department intended to investigate and issue findings of fact on the issue of attachments on a case-by-case basis, rather than rule on summary judgment (id.).

3. Analysis and Findings

In addition to demonstrating that it is a licensee, a company seeking nondiscriminatory access to utility poles must demonstrate that what it seeks to place on the poles qualifies as an attachment. The Pole Attachment Statute defines the term "attachment" as "any wire or cable for transmission of intelligence by telegraph, telephone or television, including cable television . . . and any related device, apparatus, appliance or equipment installed upon any

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[24] SELP contends that Fibertech's agreements and leases will illustrate what Fibertech means when it claims to provide dark fiber. For example, SELP suggests that there may be scenarios contemplated in Fibertech's customers' leases where the dark fiber may never be "lit," and therefore no intelligence will ever be transmitted and no service offered (SELP Opposition at 10).

pole or in any telegraph or telephone duct or conduit owned or controlled, in whole or in part, by one or more utilities." G.L. c. 166, § 25A. The parties are correct to note that the Department declined to specify particular telecommunications technologies in defining what qualifies as an attachment, and that in determining what qualifies as an attachment, the Department would "look to the language of the statute as well as the purpose which the statute seeks to accomplish – namely the promotion of consumer sovereignty." D.T.E. 98-36-A at 40-41. For the reasons stated below, however, we hold that dark fiber qualifies as an attachment and that developing further evidence on this question in this proceeding will not affect this holding.

Although the Department has not previously considered whether dark fiber is to be considered an "attachment," the Department has considered the nature of dark fiber before. The Department has found, for example, that Verizon is obligated to offer dark fiber as an unbundled network element ("UNE").[25] See Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 3, at 49-50 (1999); see also Global NAPs, D.T.E. 98-116, aff'd sub nom. Global NAPs v. New England Tel. & Tel. Co., 156 F.Supp. 2d 72 (D. Mass. 2001) (holding that leased dark fiber is a telecommunications

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[25] The Telecommunications Act defines the term "network element" as "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(29). A "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). "Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

service). Further, in considering the design of a forward-looking network architecture, the Department has assumed that a certain portion of the dark fiber deployed would be unused. See, e.g., UNE Rates Investigation, D.T.E. 01-20, at 214 (2002) (holding that a reasonable estimate of dark fiber utilization, including future demand, is between 75 and 80 percent); Consolidated Arbitrations, Phase 4-N Order at 29 (2000) (rejecting a proposed revision to Verizon's dark fiber tariff that would require a CLEC to return dark fiber to Verizon "if it is not lit within a given period").

Implicit in our finding that Verizon must provide dark fiber as a UNE is the determination that dark fiber is a facility used in the transmission of intelligence. While the statutory scheme requiring Verizon to provide dark fiber as a UNE under the Telecommunications Act does not apply to Fibertech, the dark fiber facilities that Fibertech seeks to attach are not alleged to be any different in nature from Verizon's dark fiber. In construing all disputed facts in favor of SELP for the purpose of considering the motion for summary judgment, we may assume that Fibertech seeks to attach fiber optic cables to SELP's poles, provisioned without the attached electronics necessary to transmit and receive light signals, and that these cables may remain unlit for an unspecified period. Even so, this dark fiber is a "wire or cable for transmission of intelligence by telegraph, telephone or television," and thus, we hold that dark fiber qualifies as an "attachment" under G.L. c. 166, § 25A. We grant partial summary judgment in favor of Fibertech and hold that dark fiber qualifies as an attachment.

The question of who may place attachments on poles, i.e., licensees, does not affect the analysis of what licensees may place on poles, i.e., attachments. Even if the Department were to accept SELP's supposition that Fibertech is "simply a fiber construction company" that will immediately sell off its networks once constructed, the dark fiber itself remains a wire or cable for the transmission of intelligence[26] (cf. SELP Surreply at 5). Rather, that objection raises the question of fact whether Fibertech qualifies as a licensee, not whether Fibertech's dark fiber qualifies as an attachment. Similarly, a finding that dark fiber qualifies as an attachment does not mean that a company solely in the business of providing dark fiber is a common carrier under state law.

IV. FIBERTECH DISCOVERY RULING

A. Background

During the course of discovery, SELP produced the pre-filed testimony of Thomas R. Josie ("Josie Testimony") and two memoranda authored by Mr. Josie. The first memorandum, dated October 16, 2000, from Mr. Josie to the Shrewsbury Light Commission,[27] refers to a "legal opinion that stated since [Fibertech] is not a telecommunications provider or CATV company, SELP has no legal obligation to rent pole space to them" (Motion for

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[26] Moreover, whether the eventual transferee of the dark fiber is still entitled to a pole attachment on nondiscriminatory terms if Fibertech does sell the network is not at issue in this proceeding. If Fibertech later intends to sell to another company, the new company must be a licensee, or else the new company would not be entitled to have access on nondiscriminatory terms. The new company would need to seek a transfer of the grant of location from the Board of Selectmen. G.L. c. 166, § 22.

[27] The Shrewsbury Light Commission is a municipal department that directs and controls the management of SELP pursuant to G.L c. 164, § 56.

Summary Judgment, att. 9, at 1 ("First Josie Letter")). The letter states that SELP's counsel prepared the opinion as part of an investigation in response to Fibertech's pole attachment request (id.). The second memorandum, dated May 15, 2001, from Mr. Josie to the town manager and the chairman of the Board of Selectmen, states that "SELP has an opinion from counsel stating that this fiber company, Fibertech, does not meet the Department of Telecommunications and Energy . . . criteria to mandate pole attachments from SELP" (Motion for Summary Judgment, att. 13, at 1 ("Second Josie Letter")). This letter further stated that "[a]dditional back-up information is attached" (id. at 3).

Fibertech sought discovery of the "legal opinion" by SELP's counsel referred to in the First Josie Letter, the "research" by SELP's counsel and the "[a]dditional back-up information" referred to in the Second Josie Letter, and "any documents reflecting or referring to the advice of counsel" referred to in the letters (Fibertech-2-1; Fibertech-2-2(c), (d); Fibertech 3-4(b), (c); Fibertech 3-9). SELP objected on the grounds that the information requests were "repetitive, overbroad, unduly burdensome, irrelevant and [call] for the production of documents protected by the attorney-client privilege and attorney work-product doctrine" (Fibertech 3-9; see also Fibertech-2-1; Fibertech-2-2(c), (d); Fibertech 3-4(b), (c)). In response, Fibertech filed a motion to compel discovery responses on the grounds that SELP was required to disclose the documents pursuant to the Public Records Act, G.L. c. 66, § 10(b), and that SELP waived its attorney-client privilege to the documents by "disclosing the substance" of the information contained in the documents to officials of the Town of Shrewsbury and to Fibertech and by

placing the subject matter of the legal opinions "at issue" in this proceeding (Fibertech Motion to Compel at 4-10).

The hearing officer denied Fibertech's Motion to Compel, finding that SELP did not waive its attorney-client privilege by disclosing its attorney's opinion to third parties, namely the town manager and the chairman of the Board of Selectmen, because SELP transmitted the legal opinion to those officials as part of an inter-agency memorandum regarding policy positions about the use of the public ways, and because there was no evidence that SELP's counsel prepared the legal opinion with the understanding that it would be communicated to the public or that SELP disclosed its legal opinion to anyone other than an "associated interested party" (Fibertech Discovery Ruling at 3-4). Further, the hearing officer found that SELP did not make this legal opinion an issue before the Department (id. at 4). The hearing officer also noted, in agreement with SELP's opposition to Fibertech's Motion to Compel, that Fibertech never made a public records request for these documents to SELP or to the Town of Shrewsbury, and even if such a request were denied, the Supervisor of Public Records, not the Department, adjudicates public records disputes, pursuant to G.L. c. 4, § 7, cl. twenty-sixth (id.).

B. Fibertech

Fibertech argues that the "clear and unambiguous language" of the Public Records Act mandates disclosure of the requested public records, and that this disclosure obligation is "subject only to limited exceptions" that "must be strictly and narrowly construed" (First Fibertech Appeal at 3, citing General Electric Co. v. Department of Envtl. Prot.,

429 Mass. 798, 801-02 (1999)). Fibertech maintains that neither the attorney-client privilege nor the work-product doctrine are specifically enumerated exceptions, and that these exceptions cannot be read into the statute (First Fibertech Appeal at 3-4, citing General Electric, 429 Mass. at 799; Kent v. Commonwealth, No. 98-2693, 2000 WL 1473124, at *4 (Mass. Super. July 27, 2000); District Attorney for the Plymouth Dist. v. Board of Selectmen of Middleborough, 395 Mass 629, 633 (1985)).

Further, Fibertech contends that SELP waived its privilege claims by disclosing the documents to the Town of Shrewsbury and its officials and by "[placing] the subject matter of legal advice 'at issue' in this case" (First Fibertech Appeal at 7-8). Fibertech argues that the Town of Shrewsbury is not an associated interested party, but rather is a third party, separate and distinct from SELP (First Fibertech Appeal at 8, citing Town of Middleborough v. Middleborough Gas & Elec. Dep't, 422 Mass. 583, 588 (1996). Fibertech further contends that there is no evidence to support the finding that the Town of Shrewsbury is an "associated interested party." Fibertech asserts that the opinion of counsel is "at issue" because SELP has injected an "advice of counsel" defense into this case (Fibertech Motion to Compel at 10-11).

C. SELP

SELP argues that Fibertech's appeal should be denied because only the Supervisor of Public Records, the Superior Court, or the Supreme Judicial Court are authorized to adjudicate public records request disputes if the custodian of records refuses to comply with a discovery request, not the Department (SELP Response to First Appeal at 2, citing Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 414 Mass. 609 (1993); see also

G.L. c. 66, § 10(b)). Furthermore, SELP maintains that it has demonstrated that the legal opinion would constitute an "inter-agency or intra-agency memorandum" exempt from disclosure under the Public Records Act (SELP Response to First Appeal at 2, citing G.L. c. 4, § 7, cl. twenty-sixth(d)).

SELP denies that it waived its attorney-client privilege by giving copies of the opinion to Town of Shrewsbury officials (SELP Response to First Appeal at 3). SELP states that it operates under the control of the Shrewsbury Light Commission (SELP Response to First Appeal at 3, citing G.L. c. 164, § 56). Further, SELP asserts that "the opinion was shared with Town officials because it was tied to policy-making decision regarding the use of the Town's public ways . . ." (SELP Response to First Appeal at 3). SELP argues that there is a strong presumption in favor of preserving the privilege (SELP Response to First Appeal at 3, citing Dedham-Westwood Water Dist. v. National Union Fire Ins. Co. of Pittsburgh, No. Civ. A. 96-00044, 2000 WL 33419021, *5 (Mass. Super. Feb. 4, 2000)). SELP claims that Fibertech has failed to show that SELP has disclosed the opinion to anyone other than an associated interested party (SELP Response to First Appeal at 3).

SELP further denies that it has placed the protected information "at issue" in this case (SELP Response to First Appeal at 4). SELP argues that it need not defend against claims for damages in a pole attachment case, and therefore, this case does not involve issues of "willful" violations of G.L. c. 166, § 25A or antitrust issues where advice of counsel may be a factor (id.). Finally, SELP argues that Fibertech cannot show that SELP's legal opinion is vital in

order for it to make its case, because Fibertech's counsel can formulate Fibertech's own legal analysis and argument (id.).

D. Analysis and Findings

As an initial matter, the Public Records Act is entirely inapposite to this proceeding. We note that the cases cited by both parties involved discovery disputes in which the plaintiff brought an action on the grounds that a custodian of records denied a public records request; these were not cases where the public records issue is at best an ancillary issue. Moreover, the right of a party to discovery in an adjudicatory proceeding before the Department does not turn on whether the custodian of the records must disclose the documents in response to a public records request. See, e.g., Sumner-Mack v. City of Cambridge, No. 99-3284F, 2000 WL 1473136, at *3 n.3 (Mass. Super. Aug. 3, 2000) (holding that exceptions to the Public Records Law are inapplicable because the Public Records Law does not control the scope of civil discovery); cf. Commonwealth v. Wanis, 426 Mass. 639, 642 ("A defendant's right of access to information gathered by an internal affairs division does not turn on whether the investigatory materials are or are not subject to disclosure as public records."); Bougas v. Chief of Police of Lexington, 371 Mass. 59, 64 (1976) (holding that even if such information is not available as a public record, "such discovery should follow normal procedures . . . where its availability lies in the discretion of the trial judge under standards developed by this court").

The opinions of counsel sought by Fibertech through discovery at the Department may or may not constitute disclosable public records under G.L. c. 66, § 10, and c. 4, § 7, cl. twenty-sixth. But copies of the opinions are not in the custody of the Department, and the

Department is not the enforcement agency for disclosure of public records in the custody of other government entities under G.L. c. 66, § 10, whatever our authority may be to compel discovery responses. Reliance upon G.L. c. 166, § 10 is, therefore, misplaced.

Rather, the Department's regulations provide that the hearing officer must exercise discretion in balancing the interests of the parties, and that "the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 et seq." will guide the hearing officer in determining the legitimate rights of parties to discovery in the course of a proceeding. 220 C.M.R. § 1.06(6)(c)(2). The purpose of discovery is to permit the parties and the Department "to gain access to all relevant information in an efficient and timely manner." 220 C.M.R. § 1.06(6)(c)(1) (emphasis added). Further, parties may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . [and] it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Mass. R. Civ. P. 26(b)(1). In the context of discovery disputes, the Department recognizes common law privileges of attorney-client privilege and the work-product doctrine. This practice is consistent with statute, G.L. c. 30A, § 11(2), and with caselaw, Foster v. Hall, 29 Mass. (12 Pick.) 89 (1831); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The hearing officer denial of Fibertech's motion to compel discovery responses was based on a finding that the legal opinion of SELP's counsel is subject to an attorney-client privilege, and that SELP did not waive its privilege by sharing the opinion with

officials of the Town of Shrewsbury, because SELP and the officials of the Town of Shrewsbury have a common interest (see Fibertech Discovery Ruling at 3-4).[28]

The threshold to obtaining discovery, however, is that the information sought must be relevant, that is, it relates or pertains to legal or factual issues in the case or is reasonably calculated to lead to discovery of admissible evidence. Mass. R. Civ. P. 26(b)(1). Fibertech's sole ground for its position that the information is relevant is that SELP has placed the matter of its counsel's legal opinion and research "at issue" by asserting an "advice of counsel" defense. We reject this assertion on three grounds. The first reason is that SELP denies that it is placing advice of counsel at issue. SELP's argument on this point binds SELP to that position, and, therefore, SELP may not raise advice of counsel as a defense. Second, neither the Pole Attachment Statute nor the Department's Regulations suggest that a utility's "willful" acts are facts that the Department is to consider in determining whether a complainant is entitled to a pole attachment; SELP's deliberative processes are not at issue. Rather, as we have discussed in detail above, the matter turns on whether the complainant is a "licensee," and whether the facilities that it seeks to attach qualify as "attachments." Third, we have limited the scope of the proceeding in this case to whether Fibertech is in the business of transmission of intelligence. SELP's counsel's advice to SELP does not tend to prove or disprove this point.

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[28] There is sufficient reason to conclude that "public clients have an attorney-client privilege," which they may assert in discovery disputes. See District Attorney of Plymouth County v. Board of Selectmen of Middleborough, 395 Mass. 629, 632 n.4 (1985), citing Connecticut Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448, 450 (S.D.N.Y. 1955) and Proposed Mass. R. Evid. 501(a)(1) and (d)(6) (1980).

Therefore, we uphold the Hearing Officer Ruling denying Fibertech's motion to compel discovery responses on other grounds. We hold that the legal research and opinions of SELP's counsel referred to in the Josie memoranda are not "facts" relevant to the issues before us, and discovery requests for such information in this case are not reasonably calculated to lead to discovery of admissible evidence.[29] Because we hold that the information sought by Fibertech is not relevant, we need not reach the issues about whether SELP and the Town of Shrewsbury have a common interest and whether the documents should be disclosed or protected under the Public Records Act.

V. SELP DISCOVERY RULING

A. Background

During discovery, SELP issued three sets of discovery requests to Fibertech. Fibertech objected to the following requests that are the subject of Fibertech's appeal: SELP-1-6; SELP-1-7; SELP-1-8; SELP-1-12; SELP 1-13; SELP-2-7(c), (d), and (e), SELP-2-8(c), (d), and (e); SELP-2-9(c) and (e); SELP-2-10; SELP-2-11; and SELP-3-14 (Fibertech Appeal 2,

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[29] We also note that "advice of counsel" is not raised as an issue in a case merely because a witness mentions that he or she relied upon advice of counsel. Further, to the extent that a fact witness asserts positions of law, the witness' conclusory legal statements are accorded little, if any, evidentiary weight. Such statements are considered to be argument by counsel.

at 1 n.1).[30] The hearing officer granted SELP's motions to compel discovery responses on the

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[30] We summarize the subject matters of the disputed discovery requests as follows:

SELP-1-6: Fibertech's signed leases for "dark fiber for use by communications carriers."

SELP-1-7: All documents concerning Fibertech's dark fiber customers, including rates, terms, and conditions for services.

SELP-1-8: All documents concerning Fibertech's local exchange, interexchange, and data services customers.

SELP-1-12: All documents concerning Fibertech's business plans to offer local exchange voice and data services.

SELP-1-13: All documents concerning Fibertech's plans and applications to provide cable service.

SELP-2-7: For Fibertech's New York network, whether and which portions are "lit," the customer list for the completed network, and the terms of the leases.

SELP-2-8: For Fibertech's Hartford and Pittsburgh networks, whether and which portions are "lit," the customer list for the completed networks, and the terms of the leases.

SELP-2-9: For Fibertech's "networks in progress," the customer list and the terms of the leases.

SELP-2-10: "To the extent not otherwise explained" in requests SELP-2-7 through SELP-2-9, the customer list, the nature of the service provided, and whether the fiber is lit and when and by whom.

SELP-2-11: An explanation of how Fibertech is "providing service over the completed portions of the Hartford and Pittsburgh networks" (if Fibertech responds in discovery that it has no customers).

SELP-3-14: Information regarding Fibertech's contracts with Choice One Communications, and an explanation of how the provision of dark fiber

(continued…)

grounds that the information requested may be relevant to this proceeding and that "the nature of services Fibertech provides to its customers over dark fiber may be relevant to whether Fibertech's attachments are afforded protection under [the Pole Attachment Statute and Regulations]," and further that SELP's requests may lead to the discovery of admissible evidence (SELP Discovery Ruling at 4).

B. Fibertech

Fibertech appeals the Hearing Officer Ruling on the grounds that the ruling does not state "why" the requested information is relevant (Second Fibertech Appeal at 3). Fibertech argues that the information requested is irrelevant to the threshold issue in this case, i.e., "whether Fibertech, as a wholesale provider of dark fiber facilities, is qualified as a 'licensee' for purposes of G.L. c. 166, § 25A" (id. at 4-7). Fibertech contends that it is a common carrier, having filed a Statement of Business Operations and a tariff with the Department (id. at 5). Fibertech further contends that because its status as a common carrier is dispositive of its status as a "licensee," no further discovery on that issue is necessary (id. at 4-5). Further, Fibertech concedes that it provides dark fiber without the necessary electronics to light the fiber; therefore, Fibertech argues that SELP does not need further discovery to establish that Fibertech offers fiber that is "dark" (id. at 5). Fibertech also asserts that the agreements between Fibertech and its present customers are irrelevant because they involve facilities that are outside of Massachusetts. Fibertech specifically argues that the information requested by

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[30] (…continued)
under that arrangement is provision of dark fiber as a "common carrier."

SELP-3-14, regarding its privately-negotiated contract with Choice One Communications, is not relevant because the terms on which it does business outside Massachusetts does not establish whether it meets the requirements of G.L. c. 166, § 25A (id. at 8-9). Fibertech claims that its marketing plans and engineering plans are competitively sensitive and may also be sensitive for security reasons (id. at 7). In addition, Fibertech argues that its business plans to offer voice, data, or cable television on a retail basis in the future are not relevant to whether it is "authorized to construct lines or cables upon, along, under and across the public ways" or whether dark fiber is a wire or cable for "transmission of intelligence" (id.).

Fibertech also argues that SELP's discovery requests are overly burdensome (id. at 7-9). Fibertech states that SELP-1-6, SELP-1-7, SELP-2-6,[31] SELP-2-7(d) and (e), SELP-2-8(d) and (e), SELP-2-9(c) and (e), SELP-2-10(a) and (b), SELP-2-11, and SELP-2-12 seek all of Fibertech's customer leases in their entirety. Fibertech argues that the entire leases, customer names, or the number of route miles in each city in New York and Connecticut are not relevant to the material issues before us in Massachusetts. Fibertech argues that SELP-1-7 is overbroad because it is not limited to the lease agreements, but also includes "any and all correspondence between Fibertech and its customers" (id. at 8). Fibertech argues that if it must produce such documents, they should be redacted to conceal information regarding lease rates, customer names, the number of route miles in each city, or the term of each lease (id.). Finally, Fibertech argues that SELP-1-8 and SELP-1-12 are overbroad in that they request

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[31] We note that Fibertech does not appeal the hearing officer ruling with respect to SELP-2-6 and that it did not attach its response to that request to its appeal (see Fibertech Appeal 2, at 1 n.1).

"all" documents concerning Fibertech's local exchange voice, interexchange, and data service customers and all documents on its plans to offer those services (id. at 9). Fibertech argues that if it must produce such documents, they should only be produced "after an appropriate confidentiality agreement is reached between the parties" (id.).

C. SELP

SELP argues that the leases and agreements with customers are central to the question of whether Fibertech is entitled to an attachment (SELP Response to Second Appeal at 2). SELP argues that the Department cannot rely solely upon Fibertech's testimony or assertions that it has leases and agreements with customers, without actually reviewing those leases and agreements or allowing SELP the opportunity to review them (id.; see also id. at 3 n.2). SELP further suggests that the information requested will demonstrate the nature of Fibertech's business, and there is no such evidence in the record to date (id. at 3-4). Further, SELP argues that because there has never been a petition under G.L. c. 166, § 25A by a "dark fiber" company, the requests for documents will shed light on the nature of Fibertech's business and answer how the leasing of unlit fiber cables translates into authorization as a "common carrier" to construct lines across the public ways (id. at 4).

SELP claims that the questions integral to these proceedings are: "will Fibertech, or does Fibertech plan to, be engaged in the transmission of intelligence by telephone, electricity or otherwise in the Commonwealth?" (id. at 6). SELP claims that the information sought regarding leases in New York and Connecticut is necessary, because SELP apparently has no customers in Massachusetts and the requested leases will shed light on the type of service that

Fibertech offers where it actually does have customers (id.). Further, SELP asserts that its requests regarding Fibertech's plans to offer local exchange voice, interexchange, or cable services on a retail basis are reasonably calculated to lead to the discovery of admissible evidence, since it is Fibertech that claims that is a "licensee" because it is a CLEC (id.).

SELP argues that Fibertech failed to demonstrate that the requests are unduly burdensome (id. at 7). SELP argues that in situations where a request is "unduly burdensome," the request typically seeks a voluminous amount of documents that could take a substantial amount of time to reproduce, would be difficult to transport, and are not reasonably calculated to lead to the discovery of admissible evidence (id. at 7-8). SELP states that Fibertech's claim that the discovery requests are unduly burdensome rests on the assertion that the documents requested are not relevant and contain "confidential information" (id. at 8). SELP argues that even if the information is confidential, signatories to a confidentiality agreement should still be able to view such information unredacted (id.). Rather, SELP suggests that Fibertech's recourse is to seek an order for confidential treatment under G.L. c. 25, § 5D to protect such documents from public disclosure (id.).

D. Analysis and Findings

Fibertech's argument, that the information sought by SELP is not relevant, rests upon the assumption that its registration as a common carrier is dispositive of its status as a "licensee," and therefore, that further discovery of its dark fiber agreements and plans to offer local exchange and interexchange services are not relevant. Because we hold that the question of whether Fibertech qualifies as a licensee turns upon whether it is in the business of

transmission of intelligence, not whether it is a common carrier, we find that the information sought by SELP is relevant and that the requests are reasonably calculated to lead to discovery of admissible evidence.

Fibertech also argues that the Department need not consider the nature of its business activities outside Massachusetts, and therefore, it should not be required to produce documents concerning its agreements outside Massachusetts. Even if Fibertech cannot show that it has taken concrete steps in furtherance of its business of transmission of intelligence in Massachusetts, or at least has formulated a definite business plan, the Department may still consider Fibertech to be in the business of transmission of intelligence for the purposes of G.L. c. 166, § 21, if Fibertech demonstrates that it is "a company incorporated under the laws of another state for the transmission of intelligence by electricity or by telephone or television, whether by electricity or otherwise, and which is engaged in interstate commerce within the commonwealth." G.L. c. 166, § 21 (emphasis added). Therefore, we find that the information requested concerning the nature of Fibertech's business and lease agreements outside Massachusetts is relevant to the issue before the Department; namely, whether Fibertech is in the business of transmission of intelligence.

Finally, we find that Fibertech has not demonstrated that the requests are unduly burdensome solely because the documents are claimed to be irrelevant or contain confidential information.[32] We have already found above that the documents are in fact relevant. Further, we do not consider Fibertech's assertions, that the information requested contain confidential

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[32] Nor has Fibertech alleged that the documents are voluminous or difficult to transport.

information about third parties, as grounds not to require it to produce the information in an unredacted form. Third-party confidentiality agreements are not a bar to discovery, because "the Department's primary objectives in the conduct of an adjudicatory hearing are that a complete and accurate record be developed and that all parties be accorded due process." New England Telephone Co., D.P.U. 91-63-A at 12, Order on Motion to Compel Discovery or in the Alternative to Strike Testimony (1991). The interests of third parties are considered, but not controlling. Id. at 13. The Department has long held that even if information is claimed to be confidential, the party claiming confidentiality may not limit access to such documents only to the Department, but must provide access to counsel for other parties to the proceeding and any other persons necessary to counsel's preparation in litigating the case. See, e.g., Boston Edison Co., D.T.E. 97-95, at 9-11, Interlocutory Order On: (1) Motion for Order on Burden of Proof (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (1998) (rejecting proposal to limit disclosure only to Department); D.P.U. 91-63-A, att. 1 (ordering terms of nondisclosure agreement). If Fibertech seeks to protect such information

from public disclosure, it must file a motion for protective order pursuant to G.L. c. 25, § 5D.[33]

We uphold the Hearing Officer Ruling granting SELP's motion to compel discovery responses, with the following modifications. Although we find generally that the information requested is relevant and discoverable, we find that SELP-2-7(c) and SELP-2-8(c) seek information regarding whether the fiber is actually lit, and therefore are not relevant because we have held that dark fiber qualifies as an attachment. Further, we find that SELP-2-10 is unduly repetitive because it essentially repeats the requests in SELP-2-7 through SELP-2-9. Consistent with these findings, we direct Fibertech to produce within fourteen (14) days responses to SELP-1-6; SELP-1-7; SELP-1-8; SELP-1-12; SELP 1-13; SELP-2-7(d), and (e), SELP-2-8(d), and (e); SELP-2-9(c) and (e); and SELP-2-11. We further direct Fibertech to produce within fourteen (14) days responses to the requests just named pertaining to its business operations outside Massachusetts and a response to SELP-3-14, but that, in the alternative, Fibertech may waive the argument that it is "a company incorporated under the laws of another state for the transmission of intelligence by electricity or by telephone or television, whether by electricity or otherwise, and which is engaged in interstate commerce within the

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[33] We are unable to order protective treatment at this time, because Fibertech has filed no such documents with the Department for us to consider. If Fibertech seeks to protect documents that we are now ordering it to produce, and if Fibertech seeks protection under G.L. c. 25, § 5D, we remind Fibertech that it must file both a redacted and an unredacted version of the documents, along with a motion for protective treatment identifying each document sought to be protected and the basis for seeking protection and its extent, and the length of time necessary to protect its interests. We will not reiterate here the extensive Department precedent in determining what types of documents may be protected.

commonwealth," in lieu of producing documents pertaining to its operations outside Massachusetts. See G.L. c. 166, § 21 (emphasis added). Fibertech may require SELP to enter into a confidentiality agreement that is consistent with Department precedent as we have noted above.

VI. ORDER

After due consideration, it is

ORDERED that the Motion of Fibertech for Summary Judgment is DENIED in part and GRANTED in part, consistent with the rulings in this Order; and it is

FURTHER ORDERED that, unless the Board of Selectmen of the Town of Shrewsbury grants or denies Fibertech a grant of location pursuant to G.L. c. 166, § 22 prior to the close of the proceedings in D.T.E. 01-70, the scope of these proceedings shall be limited solely to the question of whether Fibertech is in the business of transmission of intelligence for the purposes of G.L. c. 166, § 21; and it is

FURTHER ORDERED that the Hearing Officer Ruling denying the Motion of Fibertech to Compel Discovery Responses by SELP is AFFIRMED on the grounds stated in this Order; and it is

FURTHER ORDERED that the Hearing Officer Ruling granting the Motions of SELP to Compel Discovery Responses by Fibertech is AFFIRMED subject to the modifications provided in this Order, and that Fibertech shall produce such documents within fourteen (14) days of this Order.

By Order of the Department,

/s
Paul B. Vasington, Chairman

/s
James Connelly, Commissioner

/s
W. Robert Keating, Commissioner

/s
Eugene J. Sullivan, Jr., Commissioner

/s
Deirdre K. Manning, Commissioner